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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOHN ANGUS MACPHAIL,)
WAC1790310665)
Plaintiff,) **Civil No.: 19-cv-02707**
v.)
UNITED STATES DEPARTMENT OF)
HOMELAND SECURITY and UNITED STATES) **COMPLAINT**
CUSTOMS AND BORDER PROTECTION)
Defendants.)

INTRODUCTION

1. Plaintiff John Angus MacPhail, by and through the undersigned counsel, brings
this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking the release
of certain records maintained by Defendants. Defendants have explicitly refused or failed to
release, in the manner specified by FOIA, all records responsive to the FOIA request at issue in
this Complaint.

2. On January 14, 2019, Plaintiff sought records pertaining to himself through an
FOIA request submitted to Defendants United States Customs and Border Protection (“CBP”),
an agency within the United States Department of Homeland Security (“DHS”). Defendants
have violated FOIA by failing to respond to Plaintiff’s request within the statutorily prescribed
time limit, failing to disclose the requested documents, and unlawfully withholding the requested

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information. Plaintiff now asks the Court to order Defendants to respond to the request and to disclose all responsive records improperly withheld from Plaintiff.

3. CBP and DHS are each an “agency” within the meaning of 5 U.S.C. §552(f)(1) and therefore must comply with the non-discretionary statutory requirements of FOIA.

4. FOIA mandates that an agency issues a response within 20 business days of receiving a FOIA request. *See* 5 U.S.C. § 552(a)(6)(A)(I).

JURISDICTION AND VENUE

5. This Court has jurisdiction under 5 U.S.C § 552 *et seq.* (FOIA statute), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 2201 (declaratory judgement).

6. Venue is proper under 5 U.S.C. § 552(a)(4)(B) because of the nature of this matter and under 28 U.S.C. § 1391(e)(1) because Defendants are agencies of the federal Executive Branch.

7. Plaintiffs have exhausted any and all administrative remedies in connection with their FOIA requests, as detailed below.

PARTIES

8. Plaintiff is a citizen of Canada who is currently residing outside of the United States.

9. Defendant DHS is the federal department that oversees the agency from which the Plaintiff seeks records. DHS is headquartered at 245 Murray Lane, SW, Washington, D.C. 20528.

10. Defendant CBP is a federal agency within DHS that is charged with regulating and facilitating international trade, collecting import duties, and enforcing U.S. regulations.

1 including trade, customs, and immigration. CBP is headquartered at 1300 Pennsylvania Avenue,
2 NW, Washington, D.C. 20229.

3 **FACTUAL BACKGROUND**

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5 11. On January 14, 2019, Plaintiff, through his attorney, requested “video/audio
6 footage of [his] entry on September 1[, 2017] via the Nexus lane at Pacific Highway Crossing
7 (Blaine, WA), roughly between the hours of 10a.m. and 1 p.m.” On the same day, Defendants
8 advised Plaintiff that his FOIA request had been received and that is had been assigned tracking
9 number CBP-2019-022233 (the “Request”).
10

11 12. Since the receipt of this confirmation, Plaintiff has monitored the progress of the
12 Request and contacted the agency to follow up on the status of the Request.
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14 13. Despite these efforts, Defendants have not produced any documents responsive to
15 the Request. Defendants have not objected to the Request nor provided any detailed information
16 regarding specific circumstances preventing the disclosure of the records sought. Defendants
17 have not provided contact information for the FOIA public liaisons to discuss the Request or to
18 discuss a timeframe for its resolution as required by 5 U.S.C. § 552(a)(6)(B)(ii).
19

20 14. More than 20 days have passed since the Defendants received Plaintiff’s FOIA
21 request, and it has not notified Plaintiff as to whether it will fully comply with his request.
22 Where the Defendants have failed to provide any substantive responses to the Request within
23 statutory timeframe, they have constructively denied the Request. Thus, under 5 USC §
24 552(a)(6)(A) and 5 USC § 552(a)(6)(C), Plaintiff has exhausted the applicable administrative
25 remedies with respect to his FOIA request
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15. While FOIA permits an agency to toll the statutory response period by 10 working days, an agency may not exceed the 10-day extension in the absence of certain enumerated “unusual circumstances.” *See* 5 U.S.C. §§ 552(a)(6)(B)(i); (iii)(I)-(III).

16. As stated by the DHS FOIA regulation, “[w]henever the statutory time limits for processing a request cannot be met because of ‘unusual circumstances,’ as defined in the FOIA, and the [agency] extends the time limits on that basis, the [agency] shall, before expiration of the twenty-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed.” 6 C.F.R. § 5.5(c).

17. Moreover, “[w]here the extension exceeds ten working days, the [agency] shall, as described by the FOIA, provide the requester with an opportunity to modify the request or agree to an alternative time period for processing. The [agency] shall make available its designated FOIA Officer and its FOIA Public Liaison for this purpose. The [agency] shall also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.” 6 C.F.R. § 5.5(c).

18. Defendants have not responded with a determination regarding Plaintiff's FOIA request for a period well exceeding the statutory and regulatory deadline.

19. Plaintiff has the legal right to the requested records.

20. Defendants have improperly withheld those records in violation of the law, forcing Plaintiff to file suit to enforce his rights under FOIA.

CAUSES OF ACTION

Count I

Violation of FOIA

21. Plaintiff hereby incorporates by reference paragraphs 1 through 20 as if set forth in full and at length in this Count I.

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22. Defendants are obligated under 5 U.S.C. §552(a)(3) to conduct reasonable search for records responsive to FOIA requests and to issue a determination concerning each request within the time period set forth in 5 U.S.C. § 552(a)(6) – 20 working days, to be extended by no more than 10 working days in the event that the agency notifies the requester in writing of the existence of “unusual circumstances.”

23. Plaintiff has sought records that are within the possession, custody, and/or control of Defendants for purposes of FOIA

24. Defendant have failed to respond to the Request within the statutory time period. No legal basis exists for the Defendants' failure to meet the statutory deadline with respect to the Request.

25. Unusual circumstances do not justify Defendants' delay in processing the Request, and Defendants have not identified any "unusual circumstances" that would allow for an extension to respond to the Request.

26. Defendants have failed to respond to the Request, to make a timely determination concerning the request, and to disclose responsive records within the statutory time frame, in violation of 5 U.S.C. §§ 552(a)(3) and (a)(6)(A) and the regulations promulgated thereunder.

27. Defendants' failure to make a determination concerning the Request within the statutory time period constitutes a constructive denial of the Plaintiff's requests, and Plaintiff is deemed to have exhausted his administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court grant the following relief:

- (1) Find that the Defendant's failure to respond or disclose records was unlawful;
 - (2) Order Defendant to disclose the requested records in their entireties and make copies available to Plaintiff;

(3) Provide for expeditious proceedings in this action.

(4) Award Plaintiff his costs and reasonable attorney fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E);

(5) Grant such other relief as the Court may deems appropriate, just, and equitable.

Respectfully Submitted,

/s/ Bernard Wolfsdorf/

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